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THE EAST TIMOR CASE AND THE INTERNATIONAL COURT OF JUSTICE

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INTRODUCTION

1995 has been a year of anniversaries. It has been the 50th anniversary of the end of the World War II and the theme has been "Australia Remembers". But it has also been the year of selective recollection because there has been little official recollection of the part paid by the East Timorese in helping Australian soldiers in the war.

1995 has been also the 20th anniversary of the Indonesian invasion of East Timor. Australia is one of the few countries to give full recognition to Indonesia's takeover. Australia has worked with Indonesia to divide up the wealth in the East Timorese continental shelf.

On December 11 1989, Australia and Indonesia signed their most important bilateral treaty: the Treaty on the Timor Gap. This has paved the way for the joint development of oil and gas reserves in the Timor Sea.

Australia and Indonesia delineated their maritime boundaries in the early 1970s. There was a "gap" in the border because East Timor was controlled by Portugal, and Portugal wanted to see what the new law of the sea treaty would say about zone-locked countries. The new treaty was not signed until 1982 and it did not enter into force until 1994.

Meanwhile, in 1975 Indonesia invaded East Timor. Portugal and the United Nations criticized the invasion and most countries still do not recognize Indonesia's control over East Timor.

In the late 1970s, Australia commenced negotiations with Indonesia to close the "gap". This work resulted in the 1989 treaty.

In February 1991, Portugal instituted proceedings at the International Court of Justice (ICJ) against Australia over the treaty (Indonesia does not accept the ICJ's compulsory Jurisdiction and so it is not a party to the case).

The ICJ handed down its decision on June 30 1995. This publication sets out the background to the ICJ case.

THE EAST TIMOR GAP TREATY

THE EAST TIMOR GAP

The basic maritime boundary between Australia and Indonesia is set out in two Australian-Indonesian agreements. An agreement of May 18 1971 fixed seabed boundaries in the Arafura Sea from west of Cape York to north of Arnhem Land, and an agreement of October 9 1972 extended the seabed boundary westward through the Timor Sea. Australia ratified both agreements in November 1973.

The agreed boundary line was not a median (that is, equidistant) line between Australian and Indonesian land territory. It was a compromise between the Indonesian position that there was a single continental shelf between the two countries (for which a median line would be appropriate) and the Australian position that there were two shelves, with the Australian shelf extending north to the Timor Trough, a long and deep (over 3,000 metres deep in some places) geological feature running east-west for hundreds of kilometres south of the Timor coast.

The Timor Gap in the agreed boundary was the subject of separate negotiations between Australia and Portugal in the early 1970s. East Timor was a low priority for Portugal at that time. Portugal was willing to bide its time awaiting the outcome of the Third UN Law of the Sea Conference. The conference was dealing with, among many other things, the delimitation of maritime boundaries between adjacent countries.

Additionally, Australia did well out of its negotiations with Indonesia by gaining about 70 per cent of the shelf between it and Indonesia. The implication of Australia's agreements with Indonesia was the line through the Gap would simply join up the two boundaries between Australia and Indonesia. Portugal was unwilling to be so generous and hoped for a negotiating advantage to come from the UN conference.

Indonesia's 1975 invasion of East Timor disrupted Portugal's negotiations with Australia.

THE BRIDGE INTO ASIA

Australia and Indonesia are geographical neighbours but only distant friends. Australia's relationship began well: Australia's Labor Government was one of the few western governments to support, in the 1940s, the campaign for its independence from The Netherlands.

However, the election of a (conservative) Liberal Government (1949-72) tied Australia back into the US bloc for the Cold War's duration. Indonesia went on to pioneer the non-aligned bloc in international politics. There has been a deep-seated suspicion, stemming largely from ignorance from both sides of two vastly different cultures. Indonesia is only Australia's 13th largest export market.

But the Labor (1972-5 and 1983-to date) and Liberal Governments (1975-83) evidently both shared Indonesia's concerns over an independent East Timor. In the mid-1970s, with the Cold War still raging and the hysteria over "threats from the north", the Australian Government feared that East Timor could have become a "Cuba" immediately to Australia's north. The Australian Government was worried that a small, impoverished island reliant on foreign communist help would have enabled communist governments to get their first firm foothold in the region. Australian Governments have apparently reasoned that it would be better for Australia to have East Timor under firm Indonesian control, rather than it be allowed to go its own way. (In retrospect, with the Cold War over, such a fear was nonsense, but that was the type of hysteria that motivated some politicians and bureaucrats at the time.)

Therefore, Australia's initial motives over East Timor were derived from power politics: Australia decided that it would be better off with Indonesia controlling East Timor rather than East Timor being independent (and potentially pro-communist).

Additionally, with the control over East Timor settled, Australia could try again to close the Timor Gap by having negotiations with Indonesia.

An eventual Timor Gap treaty would enhance the Australian-Indonesian relationship. Therefore, in a wider sense, the significance of the Timor Gap Treaty is that Indonesia is Australia's bridge into Asia. Asian countries are sceptical of Australia's new-found enthusiasm to be seen as an "Asian" country. Australia has to prove that it can get on well with its nearest Asian neighbour if it wants other Asian countries to accept its "Asian" credentials.

Senator Gareth Evans, speaking on February 9 1991, when the Timor Gap treaty came into effect, said:

The Timor Gap treaty is

the most substantial bilateral agreement concluded in the 40-year history of Australia-Indonesia relations. It symbolizes the spirit of practical co-operation and friendship which has characterized our relations in recent years.[1]

The Timor Gap Treaty, then, has for Australia a political and economic significance that goes well beyond just closing the gap in its northern maritime boundary.

AUSTRALIAN-INDONESIAN NEGOTIATIONS

Four years after Indonesia's invasion of East Timor, Australia, in 1979, commenced negotiations with Indonesia over closing the Timor Gap. The negotiations dragged on for a decade because there was a disagreement over where the line should be drawn.

In essence, Australia based its claim on the natural prolongation principle (on geomorphology) and Indonesia's was based on the distance criterion.

In its 1971-2 negotiations with Indonesia, Australia's position was based on the 1958 Geneva Convention on the Continental Shelf. That convention defines the continental shelf as "(a) the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands" (Article 1). Article 6(2) goes on:

Where the same continental shelf is adjacent to the territories of two adjacent states, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principles of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each state is measured.

The provisions of the eventual 1982 UN Convention on the Law of the Sea relating to the continental shelf (especially Article 76) and to boundary delimitation are not perfectly clear.

Indonesia's view was that every country is entitled to a continental shelf of at least 200 nautical miles if no other country's interests were affected. This is irrespective of whether or not the shelf actually extends that far - and there is doubt from Australia's point of view that it does because of the Timor Trough (an opinion naturally not shared by Indonesia).

Thus, where the adjacent or opposite coastlines are less than 400 miles apart, as in the case of Timor and Australia, a median line would be appropriate. This would put the line much closer to the Australian coast than simply connecting up the two boundaries delineated in the early 1970s.

Australia naturally did not accept that view, maintaining, on the contrary, that there were two separate propositions embodied in Article 76. The first was that the coastal country was

entitled to exercise jurisdiction over its continental shelf throughout its natural prolongation. The second was that where the continental shelf does not extend out 200 miles, the coastal country was entitled to exercise jurisdiction over the seabed, regardless of its nature, out to 200 miles. In Australia's view, the concept of natural prolongation of the continental shelf was expressly preserved in Article 76 and was given primacy.

The gulf between Australia and Indonesia ultimately was based on more than the interpretations of provisions on the continental shelf. Indonesia argued that this type of consideration had been overshadowed by the 1982 treaty's creation of 200 mile exclusive economic zones - and where nations were zone-locked, the principle of equidistance was to be applied.

THE TIMOR GAP TREATY

The way out of this deadlock was imaginative: the creation of a zone of co-operation. Its southern boundary is based on Indonesia's claim to a 200 mile jurisdiction and its northern boundary is based on Australia's claim to a boundary set by the continental shelf.

The treaty's geographical scope of application has been divided into three areas, which, ironically, form a coffin-shape.

Area B (closest to Australia) is administered under Australia's exploration and taxation regime, with Indonesia receiving 10 per cent of the gross resource rent tax revenue from successful oil discoveries.

Similarly, Area C (closest to Indonesia) is administered under Indonesian jurisdiction, and Australia will receive 10 per cent of the company tax receipts from that area.

Area A is to be exploited jointly by Australia and Indonesia: the Australia Indonesia Zone of Co-operation. This is the largest of the three areas (just a little smaller than the state of Tasmania) and it is thought to contain the largest reserves. Much of the Timor Gap Treaty is devoted to setting out how this will operate. The two countries have created an Authority to develop the zone. The Authority is controlled by two executive directors, one based in Darwin and the other in Jakarta. The zone is divided up into 14 "contract blocks", which have been put out to tender to oil companies.

It was the triumph of politics over morality. Australia negotiated with a country that had taken over East Timor by force, whose occupation was accepted by only a minority of the world's countries, and an occupation resisted by the East Timorese themselves.

THE UNITED NATIONS

East Timor has been on the UN's agenda for longer than many other trouble spots. It went onto the UN's decolonization agenda in 1960 when the UN General Assembly included East Timor on its list of Portuguese overseas territories about which Portugal was obliged to supply information. Portugal was, at most, only a reluctant participant in this process; it resented international discussion of its imperial affairs.

Following the 1975 Indonesian invasion, East Timor has appeared on the agenda of several other UN bodies. For the purposes of this publication, the most important body is the International Court of Justice, which is dealt with separately.

THE GENERAL ASSEMBLY

The UN General Assembly consists of all the UN member-states. It meets for the last four months of each year in its ordinary session. It adopts resolutions which are not binding on its members (except for domestic UN matters).

The General Assembly's 1975 session coincided with the de facto FRETILIN Government and the subsequent Indonesian invasion.

The General Assembly adopted Resolution 3485 [XXX] calling for the withdrawal of Indonesian forces and recommended that urgent action be taken by the UN Security Council to protect East Timor's territorial integrity and the Timorese right of self-determination.

Indonesia ignored the resolution. Because General Assembly resolutions, except for those pertaining to domestic UN business, are not binding on any government, Indonesia was free to ignore it without breaking its international obligations.

East Timor has languished on the UN General Assembly's agenda. Between 1976 and 1982, the annual General Assembly sessions adopted resolutions affirming the 1975 one. The majorities in favour of the resolutions gradually declined but Indonesia could never quite muster the numbers to knock East Timor off the General Assembly agenda.

THE EAST TIMOR CASE AND THE INTERNATIONAL COURT OF JUSTICE

For the past decade, East Timor has remained technically on the annual agenda but no substantive resolution has been adopted - a procedural device is used to carry it over to the next session. Indonesia has never quite felt confident enough to bring a substantive resolution to the vote to negate the 1975 resolution.

Rather like Portugal itself, the world's governments at the UN have wavered between a luke warm interest in East Timor's fate and an indifference to it. Indonesia has played with a diverse range of cards: as a founder of the non-aligned movement it has worked with some Third World countries to get East Timor off the agenda. It has also exploited its relationships with the US, Japan and Australia for the same end.

However, other UN member-nations could not quite let go of East Timor. The UN is sometimes the home of lame causes for which it cannot bring itself to perform a "mercy killing". This reluctance to perform mercy killings is, of course, sometimes by vindicated by history.

One such lame cause was German South-West Africa, which South Africa acquired after World War I under the League of Nations to administer as a Mandate, and which then became a Trust Territory when the UN was created in 1945. South Africa's administration was later revoked by the UN but South Africa ignored it. Each year the General Assembly adopted resolutions critical of South Africa's continued occupation. Each resolution was ignored by South Africa, and the major western countries did not little to encourage South Africa to change its mind. It was another lame cause that the UN could not quite bring itself to drop. However, by the mid-1980s South Africa was spending US$1 billion per year fighting the South-West African People's Organization and overseas investors in South Africa were worried about the conflict's toll on the South African economy. South Africa began to look for a way out of the conflict. Events then moved rapidly. There was a UN-supervized act of self-determination (in which the Australian Electoral Office played an important role in handling the voting). Namibia, as an independent country, joined the UN in April 1990.

Obviously the supporters of East Timorese independence hope that the Namibia story will be a precedent for their own cause.

THE SECURITY COUNCIL

The Security Council deals with threats to international peace and security, and it is ready to meet at any time day or night. The Security Council has, under the UN Charter, far more power than the General Assembly. Under the UN Charter, all member-nations pledge themselves to follow Security Council resolutions (Article 25).

Portugal complained to the Security Council about the invasion of its territory. The Security Council, on December 22 1975, adopted Resolution 384 [1975] calling for the withdrawal of Indonesia's forces. Indonesia ignored that resolution.

The resolution also requested the UN Secretary General to send a representative for an on-the-spot assessment of what was happening. The Security Council discussed his report in April 1976. It was dissatisfied with Indonesian assurances that all was well, and so it again called for the withdrawal of Indonesian forces (Resolution 389 [1976]). Indonesia has continued to ignore that instruction.

On July 17 1976, East Timor was proclaimed the twenty-seventh province of Indonesia. The Indonesian Government informed the UN that East Timor was now an "internal matter" and it was no longer appropriate for the UN to consider it. (Article 2(7) of the UN Charter says that the UN cannot intervene in matters which are essentially within the domestic jurisdiction of any country).

But the UN has never recognized the integration of East Timor into the Republic of Indonesia and it regards Portugal as the administering authority.

THE SECRETARY-GENERAL

The Secretary-General has been conducting private negotiations between Portugal and Indonesia (there are no East Timorese involved). Little progress has been made since this work began in 1982.

The negotiations have been done as a belated consequence of the two Security Council resolutions, and the fact that Indonesia has not been able to get East Timor off the General Assembly's annual agenda. East Timor lingers on the General Assembly's agenda, even though it has not been subject to an explicit resolution since 1982. Therefore, the Secretary-General is obliged to do something about East Timor. The most recent round of these annual negotiations was held in New York in May 1995.

HUMAN RIGHTS BODIES

East Timor has also appeared on the agendas of other UN bodies, such as the Commission on Human Rights and its Sub-Commission. Annual sessions have been marked by Indonesian lobbying to get East Timor off their agendas. Some years it has had the numbers to do so, and some years it has not.

At present, the tide of international opinion is flowing against Indonesia. This may be seen in three developments.

First, 1990 saw the end of the Cold War. The Cold War was the central defining event of international relations between 1945 and 1990. All foreign policy matters were viewed in the context of where a country stood vis-a-vis the US and USSR. The two super powers and their immediate allies used to overlook human rights violations if committed by their own friends, and instead concentrated on the violations committed by their opponents. Many Third World countries also had their own policies of selective indignation. Indonesia had a good hand of cards: links with both the Third World and the First World (via the US).

The end of the Cold War has changed international relations. The US can no longer use the larger dangers posed by the USSR as an excuse for overlooking human rights violations committed by US allies. In

short: there may now be a new era whereby human rights violations are examined on their own merits and not through the prism of the higher politics of the Cold War. Indonesia is no longer seen as a bulwark against communism, and so the US may be more critical of its human rights policies.

The second development took place in August 1990: Iraq's invasion of Kuwait. Countries such as the US and Australia, which had long ago ceased criticizing Indonesia's invasion of East Timor, were suddenly enraged by Iraq's invasion. As the Australian Prime Minister (Bob Hawke) said at the time of the Iraqi invasion: "Big countries cannot invade little countries and get away with it".[2]

The international community's opposition to the Iraqi invasion meant that Indonesia had no chance of resisting East Timor's continuation on the 1990 UN General Assembly agenda. Countries were unwilling (no matter how sympathetic they may be to Indonesia) blatantly to overlook East Timor while expressing anger over Kuwait.

The third development occurred on November 12 1991, when Indonesian forces shot into a crowd of people at the Santa Cruz cemetery in East Timor's capital of Dili. A memorial mass had been held for Sebastiao Gomes, a youth shot dead by troops in an incident on October 28, and this mass was followed by a pro-independence demonstration. Just what happened and how many mourners were killed remain unclear.

This was East Timor's "Sharpeville". Other massacres had taken place since 1975 but this was East Timor's first televised one. In this television-oriented age, an event does not take place if there is no camera to film it. East Timor had been neglected by the major media outlets (those based in the US and UK) between 1975 and 1989: it was not important for US and UK financial interests, its inhabitants do not speak English, and Indonesia had had to close it off from the world while it conducted its military operations.

East Timor started to become more visible in October 1989, with the visit of the Pope. Indonesia is the world's most populous Moslem nation and Catholics constitute only 3 per cent of the population. All papal trips attract considerable media attention, and each papal word and gesture is subject to close scrutiny. He visited Dili but did not kiss the ground (a gesture reserved for visiting independent countries - and he evidently regarded East Timor as part of another country). As The New York Times journalist reported, he was careful not to offend the Indonesian Government: "Pope John Paul II wound up a long trek across Indonesia today, telling Roman Catholic bishops to speak out against human rights abuses but trying to reassure the Government that Catholics present no threat".[3] The Pope did nothing to encourage the East Timorese to continue to resist the Indonesian invasion - but his mere presence in Dili obliged the media to pay some attention to East Timor. The trip sensitized them to East Timorese affairs.

There were foreign journalists back in Dili in November 1991. They were sent to report on a long-awaited Portuguese Parliamentary Mission (which in fact was cancelled a few days prior to the massacre). One of the journalists (a New Zealand citizen) was killed in the Santa Cruz massacre and an American journalist received a fractured skull (ironically by a soldier using an American-made rifle). Journalists got film and radio material back to the UK and US and then onto the international networks.

The public relations aftermath of the massacre was badly handled by the Indonesian Government. Previous East Timor massacres had come and gone, and there had been little international reaction. The Government expected the same this time. It misunderstood the impact created by the film footage. The Government conveyed an impression of being haphazard in finding out what

had happened and in punishing those responsible. The mourners who took part in the protest at the cemetery received harsher prison sentences than did the soldiers who carried out the killings.

Taken together, these three developments mean that East Timor is unlikely to disappear back into political obscurity. It may not become a leading political crisis - but equally it will not return to be quite so neglected as it has been. As the journalist Adam Schwarz has commented:

The increasing attention paid around the world to the right of self-determination and to human rights issues will ensure that East Timor remains a drag on Indonesia's foreign policy profile. Much to Jakarta's dismay, a resolution passed by the UN Human Rights Commission in May 1993 censured Indonesia for its poor human rights record. Surprisingly, support for the resolution came from the United States, which for many years had voted in similar forums in support of Indonesia. The newly installed Clinton administration, however, voted for the censure resolution and its example was followed by 21 other countries.[4]

THE INTERNATIONAL COURT OF JUSTICE

In February 1991, Portugal instituted proceedings at the International Court of Justice (ICJ) against Australia in a dispute concerning "certain activities of Australia with respect to East Timor".

The ICJ is the UN's principal judicial organ. Its seat is at the Peace Palace in The Hague, The Netherlands. It began work in 1946, when it replaced the Permanent Court of International Justice, which had functioned in the Peace Palace since 1922.

The ICJ has a dual role: to settle, in accordance with international law, the legal disputes submitted to it by countries, and to give advisory opinions on legal questions referred to it by UN bodies.

The ICJ is composed of 15 judges, elected to nine-year terms of office by the UN General Assembly and Security Council sitting independently of each other. It may not include more than one judge of any one nationality. Elections are held every three years for one-third of the seats, and retiring judges may be re-elected. The members of the ICJ do not represent their governments and are independent of political influence.

The roots of the ICJ go back to an era - at the beginning of this century - when visionaries believed that war could be outlawed and that governments could settle their disputes by using an international court.

This vision is still a long way from reality.

First, many governments have been unwilling to accept that the ICJ has an automatic right to hear cases brought against them ("compulsory jurisdiction"). Only about 60 countries (about one-third of the UN's membership) have accepted the ICJ's compulsory jurisdiction. Ironically, many of the ICJ's 15 judges comes from countries whose own governments do not accept the ICJ's compulsory jurisdiction.

This is an example of the problem of national sovereignty: governments cannot be forced into accepting international obligations against their will. Thus, in the mid-1970s, for example, France said that nuclear testing in the South Pacific was a matter of national security and that it did not accept that the ICJ had the right to interfere in its nuclear testing programme. It boycotted the ICJ case brought by Australia, Fiji and New Zealand (although coincidentally it stopped testing in the atmosphere).

Australia is one of the 60 recognizing the ICJ's compulsory jurisdiction. But Indonesia has not accepted the ICJ's compulsory jurisdiction and so Portugal is unable to take it to the ICJ.

Second, only nation-states can be parties to an ICJ case. This means that only countries can bring a case and only countries can be defendants. In

Australia, for example, there are occasionally statements that Aboriginal groups will take Australia to the ICJ; they cannot. Similarly the East Timorese have no right - at present - to take a case to the ICJ. Also, a country cannot take a non-nation-state entity to the ICJ (such as an oil-drilling transnational corporation - although it could try to take the country which has the TNC headquarters on its territory).

Third, there is no international enforcement system. Once an ICJ decision is made, there is no automatic "police

THE IMPORTANCE OF EAST TIMORESE RESISTANCE

A great deal depends on the persistence with which the East Timorese themselves continue their quest for self-determination. Jakarta has played its role badly and has done much to alienate the local population. As The Australian said in an editorial: Economically, East Timor has always been treated by the army as a fiefdom. The consequences for the island's economy have been bad. Most industries are owned outside the province, and there is no indication that the people will get a share of the cake in the near future. Despite 20 years of Indonesian governance, East Timor has experienced only a modest increase in real income during that time.

Many East Timorese have not reconciled themselves to Indonesian rule. The political situation remains volatile, and violence can easily flare up from a nervous military force which is aware that two decades of occupation have not quashed the East Timorese quest for self-determination (as shown by the November 12 1991 Dili Santa Cruz Cemetery massacre). The Indonesians are, then, failing to "win the hearts and minds" of the people.

The East Timorese are still, in short, trying to exercise their right of self-determination - a right reaffirmed by the ICJ in June 1995. East Timor will long remain on the international agenda. Australia will have to become reconciled to that fact.

force" to follow it up. The matter could be referred to the UN Security Council but here it would be vulnerable to the veto system of the five permanent members.

Fourth, not every dispute may be suitable for handling by a court system. An example concerns the Suez Canal in the late 1950s, when Egypt was refusing the canal to be used by ships trading with Israel; the US was on good terms then with both Israel and Egypt, and urged both to take the dispute to the ICJ. Both refused since the ICJ would give a clear decision and neither side wanted to risk a clear judgement against it (governments sometimes prefer a blurred result).

Finally, there are problems over the procedural aspects of the ICJ, such as evidence. In the municipal legal systems, the lower courts deal with facts (what actually happened?) and the higher (appellate) courts deal with matters of interpretation of the law. The ICJ has to deal with both. Compared with the evolution of some municipal legal systems which have evolved over the centuries (such as England's), the ICJ system is still new and unsophisticated.

ICJ judges are often appointed with an appellate court, academic or government background, with an interest in treaty creation (which is useful for appellate work). But they may have limited experience in the work of lower courts in sifting the evidence. There is an assumption that governments provide evidence honestly, and so the ICJ sees its task as to weigh up the legal arguments of both sides. But there is a risk that the evidence may be accidentally or deliberately false. ICJ judges are drawn from all over the world and so there may also be cultural differences in how the evidence is interpreted.

To sum up, the ICJ is still a long way from its architects hoped for it. But, compared with only (say) a century ago, some progress is being made in international law and international legal institutions.

ISSUES RAISED BY THE ICJ CASE

Given the complexity of the case, it is not possible to summarize fully the contrasting arguments made by Portugal and Australia. Instead, all this section can do is to highlight some of the main points and to provide a commentary on them where appropriate.

PORTUGAL'S ARGUMENTS

Portugal did not complain to the ICJ about the details of the Timor Gap Treaty. Instead, it complained that Australia, by negotiating with Indonesia over the delimitation of the Timor Gap, recognized East Timor as a province of Indonesia and so has divided up Portuguese territory. It said that Australia had operated contrary to the dormant - though not dead - UN Security Council resolutions of 1975 and 1976, which declared Indonesia's 1975 invasion of East Timor to be illegal under the UN Charter and called for Indonesia to withdraw. Indonesia ignored that instruction and Australia has co-operated in dividing up territory which the UN still regards as Portuguese. Because the UN still regards Portugal as the administering authority of East Timor, Australia ought not to have colluded with Indonesia in the dividing up of Portuguese territory.

Portugal said that Indonesia had violated, in particular, two important clauses in the UN Charter. Article 2(4) obliges member-nations to refrain from the threat or use of force against the territorial integrity or political independence of any country. This key UN Charter provision is also repeated in the 1982 UN law of the sea treaty (Article 301).

Additionally, the UN Charter seeks the independence of "non-self-governing territories" (Articles 73 and 74); East Timor went from being a Portuguese colony to (it is claimed by Indonesia) an Indonesian province - without any opportunity to decide for itself whether it wanted to become an independent country. Australia co-operated in these violations by virtue of negotiating the Timor Gap treaty and also (like Indonesia) violated Article 25 of the UN Charter, which obliges member-nations to obey UN Security Council instructions.

There is also Resolution 3 of the 1982 UN Law of the Sea Conference, which deals with the resources of territories which are not yet independent. This was adopted to protect the interests of non-self-governing territories whose population may lose out from potential marine benefits as a result of agreements made by their colonial controllers prior to their gaining independence. The negotiators were thinking of occupied territories like South-West Africa (Namibia) but the reasoning could also apply to East Timor.

East Timorese marine wealth has been consigned to Indonesia and Australia as a result of the Timor Gap Treaty. The treaty itself contains no provision guaranteeing the wealth gained from the exploration will

be used to help East Timor specifically (it will presumably go into the Indonesian Government's consolidated revenue and be spent throughout the country).

AUSTRALIA'S REPLY

Australia's reply was based on two sets of arguments.

The first set of arguments were procedural. First, Indonesia was absent from the case. Indonesia did not accept the ICJ's compulsory jurisdiction and so Portugal could not take it to the ICJ. Portugal did the next best thing: taken Australia to the ICJ. But Portugal did not challenge the right to Australia to exploit the wealth in the area south of East Timor (however defined). Therefore, according to Australia, Portugal attacked the wrong target.

Additionally, Australia argued that in order to assess Portugal's rights in this matter, the ICJ must first determine the legality of Indonesia's presence in East Timor. But the ICJ could do that because Indonesia was not involved in the case.

Second, according to Australia, Portugal had a lack of standing in this matter because of its lack of involvement in East Timorese affairs since it fled the island in 1975.

What was Australia to do (it asked)? Australia had a dispute on its northern border, and Australia, seeing the lack of action by Portugal and the UN, had no choice but to take its own action. In short, Australia had to negotiate with Indonesia in order to look after its own economic development. Oil companies were anxious to start exploratory drilling and there was media speculation about a "bonanza" in the Timor Gap. For example, the "discovery by Woodside at its Laminaria-1 well in the Timor Sea [in October 1994] was hailed as the most significant oil find in Australian waters since Bass Strait in the 1960s".[5] This is just outside the Gap and it is a good omen for the speculation about the size of the reserves - which have been estimated as making the Timor Sea contain the world's twenty-third largest oil field. International Business Asia has claimed:

Recent oil discoveries in the Timor Sea have made the area one of the brightest exploration spots in the region, with expectations that the Northern Territory could become Australia's second largest oil producer after Victoria...

"The Timor Gap is a world class exploration area", said Mr Bill Tinapple, director of the energy division of the Northern Territory's Department of Mines and Energy. He said the latest discoveries have provided confidence that by the end of the decade, oil fields in the area would provide about 30 per cent of total Australian production, with this ratio rising to 40 per cent by the year 2005.[6]

Oil companies were not worried about which country in

particular owned the Timor Gap region - they find ways of co-operating with governments irrespective of their political viewpoints - but they do require certainty of national ownership and (therefore specific leasing to them) in order to commence investments. It would be, according to Australia, unfair to hinder Australia's economic development because of a dispute to Australia's north for which Australia had no responsibility.

The second set of Australia's arguments were substantive ones.

First, there is no special status of an "administering power" at international law. Australia argued that it was not required by international law to treat Portugal as the sole country entitled to exercise power over East Timor because Portugal had in fact had no power over East Timor since 1975. Australia also pointed to the irony of Portugal's exploiting its title of "administering power" when it was so heavily criticized by the UN for its colonial role between 1960 and 1975. Thus, it seemed ironical, that Portugal, which had attracted so much criticism when it was the administering power prior to 1975 and yet ignored that criticism, should now be using that status when it suits it. Additionally, Portugal had not encouraged the UN General Assembly since 1982 to adopt any resolution on East Timor.

Second, Australia argued that its Timor Gap Treaty had not attracted UN criticism (unlike, say, Iraq's invasion of Kuwait). There were, for example, no General Assembly or Security Council resolutions criticizing the Treaty. No UN body, for example, called on Australia not to ratify the Timor Gap Treaty.

Additionally, governments have not made use of a standard international law device that could have been used for criticizing the treaty. When governments enter into a treaty, they are entitled to make "reservations" to it, both on the substantive matters of the treaty itself or as a continuation of old policies. For example, although the Red Cross symbol has no religious significance, some Red Cross Societies in Islamic countries have a Red Crescent symbol. However, Israel has had no success in getting international recognition for its Red Shield of David symbol. But, when appropriate, such as when signing the 1949 Geneva Conventions, the Government of Israel enters a reservation reaffirming that it would use the Red Shield of David symbol. Australia has pointed out that no government entering into an agreement with Australia has made any reservation declaring that it does not recognize Australia's Timor Gap Treaty.

Finally, in the absence of a specific UN resolution requiring non-recognition of Indonesian control over East Timor, Australia was not been prevented from negotiating with Indonesia to sort out Australia's own resources in the Timor Gap.

THE ICJ JUDGEMENT

The ICJ decided on June 30 1995 that it could not decide on the merits of the case because Indonesia had not accepted the ICJ's compulsory jurisdiction.

The Australian Government was prompt to claim a victory. It was a victory in the sense that it had not lost the case. It was only a victory on technical grounds.

But it was a bitter victory. Even though the ICJ had decided that it could comment upon the merits of the case, it decided nonetheless to reaffirm the East Timorese right to self-determination. It was almost as though the ICJ feared that its decision would be misrepresented and so it wanted to ensure that it did nothing to bring reassurance to the absent Indonesians by at least reaffirming the East Timorese right of self-determination.

Australia had already been over that stony path during the ICJ hearing. On the one hand, Australia had found it necessary to show that it was not entirely devoid of principles by, during the hearing, reaffirming that it recognized the East Timorese right to self-determination, territorial integrity and permanent sovereignty over its natural resources. This was such a major admission that Australia advised Indonesia beforehand on what it was going to say at the ICJ.

On the other hand, Australia tried to distance itself from this principle of self-determination by arguing that how that claim was to be achieved was a matter for the UN in conjunction with the parties concerned. Since Australia was not involved in the UN Secretary-General's private consultations, Australia was not one of the parties concerned and so it was peripheral to the basic issue of East Timor self-determination.

Therefore, the ICJ hearing obliged the Australian Government to set out in some detail its support for East Timorese self-determination. This support presumably must have caused some annoyance in Indonesia, which regards the issue of self-determination as having been settled in 1976, when East Timor "decided" to become an Indonesian province. Australia's problem has been that that act of self-determination convinced few governments and the UN itself still requires an act of self-determination to take place.

Brian Toohey accused Gareth Evans of having "an each-way bet on East Timor": working with the Indonesians while also claiming to accept East Timor's right to self-determination:

> Australia's 1978 statement of de facto recognition of the incorporation of East Timor did not contain any qualification about an ongoing right to self-determination. Nor did the 1979 statement of de jure recognition. Nor did the final 1991 text of the Timor Gap Treaty which recognized East Timor as a province of Indonesia.
>
> Nor are there any other examples in the post-colonial era of a territory which Australia recognizes as having a right to self-determination at the same time as being a sovereign part of an invading country. Indeed as recently as last September [1994], Evans made a spirited speech to the Labor Party Conference in Hobart, saying there was no way that the Indonesian occupation of East Timor could be reversed.[7]

The ICJ judgement has been a major help to the international recognition that there has yet to be an act of self-determination of the East Timorese. The ICJ judgement therefore is of great significance to the human rights work being done by the UN.

AUSTRALIA IN THE EAST TIMOR SWAMP

The Indonesian Foreign Minister has called the continuing problems within East Timor a "pebble in Indonesia's shoe". For Australia, an appropriate analogy is that East Timor is a swamp. The more that Australia struggles in the swamp, the more it sinks into it.

Thus, for example, the Australian Government was obliged to reaffirm the right of East Timorese self-determination. It had to affirm a basic international principle but it did so at the cost of annoying Indonesia.

The swamp will get worse as the oil and gas wealth flow into Australia and Indonesia. The boom cities will be Darwin and in Indonesia. The people who actually own the continental shelf - the East Timorese - will not get much of it. This inequality will only increase the international spotlight on the Indonesian/ Australian land grab. It is very difficult for Australia to complain about other invasions (such as Iraq's invasion of Kuwait) when it, too, has blood on its hands.

At the very least, Australia should insist that some of Indonesia's wealth flows into East Timor and that some of Australia's wealth should be set aside in trust funds to assist the East Timorese who have fled to Australia.

The East Timor problem is not going to go away. During 1995, for example, various veterans of World War II called on the Australian Government to do more to help the East Timorese - and so help replay the debt of blood that is owed to them for all their help to Australia in World War II.

East Timor has been invaded twice this century. The first time was in January 1942 - by Australia. Australia decided to go into East Timor to fight the Japanese outside of Australian soil. Portugal was neutral during World War II and so it is not certain that East Timor would have been invaded by the Japanese. Australia violated international law by invading a neutral territory. By contrast, West Timor was part of the Dutch Empire, and because the Netherlands was in the war, Japan was an enemy. Australia's invasion of East Timor probably drew the Japanese into East Timor. Japan had no need to go into East Timor were it not for the Australian presence. Although it was not their war, the East Timorese helped the Australians - at great cost to themselves. They were more helpful than the West Timorese. Australia has had many activities to mark the end of the World War II. But it has done nothing to admit that it violated Portuguese neutrality in World War II.

Another example of the swamp occurred in October 1995, when East Timorese refugees arrived in Australia. The Australian Prime Minister claimed that the East Timorese were, in fact, "Portuguese citizens" and so should be in Portugal (rather than Australia). He was caught in the swamp. Australia had argued at the ICJ that, in fact, Australia had no choice but to enter into that agreement with Indonesia because Indonesia is in control of East Timor. Therefore, to finalize the Australian maritime border delimitation, Australia had to negotiate with Indonesia (and not Portugal). In October, quite suddenly, Mr Keating said that the East Timorese were in fact Portuguese.

Australia is paying the price for its lack of integrity in its policy over East Timor. It did nothing to help East Timor in 1975, in the expectation that the problem would soon go away. Two decades later, the problem remains - such as the refugee issue.

UFRTHER READING

Australian Council for Overseas Aid East Timor: Towards a Just Peace in the 1990s, Canberra: 1990

Desmond Ball and Helen Wilson (Editors) Strange Neighbours: The Australia-Indonesia Relationship, Sydney: Allen & Unwin, 1991

Carmel Budiardjo and Liem Suei Liong The War Against East Timor, Sydney: Pluto, 1984

Henry Burmester "Zone of Co-operation Treaty" Maritime Studies (Canberra), July 1990, pp 16-18

Roger Clark "The 'Decolonization' of East Timor and the United Nations Norms on Self-determination and Aggression" The Yale Journal of World Public Order, Fall 1980, pp 2-44

Roger Clark Timor Gap: The Legality of the "Treaty" on the Zone of Co-operation in an Area Between the Indonesian Province of East Timor and Northern Australia December 14 1990 (mimeo available from the author, Rutgers School of Law, Camden, New Jersey)

Catriona Cook "The Australia-Indonesia Maritime Boundary" in Australia's Offshore Maritime Interests, Canberra: Australian Centre for Maritime Studies, 1985, pp 40-53

Department of Foreign Affairs and Trade Briefing Papers: International Court of Justice: Portugal v. Australia, Canberra, 1995

James Dunn Timor: A People Betrayed, Brisbane: Jacaranda, 1983

James Dunn The Balibo Incident in Perspective, Sydney: Australian Centre for Independent Journalism, 1995

Jean-Pierre L Fonteyne "The Portuguese Timor Gap Litigation before the International Court of Justice: A Brief Appraisal of Australia's Position" Australian Outlook (Canberra) November 1991

Geoffrey Gunn and Jefferson Lee A Critique of Western Journalism and Scholarship on East Timor, Manila: Journal of Contemporary Asia Publishers, 1994

Jose Ramos Horta Funu: The Unfinished Saga of East Timor, Trenton, NJ: Red Sea Press, 1987, p 18

Jill Jolliffe East Timor: Nationalism and Colonialism, Brisbane: Queensland University Press, 1978

Rodney Lewis Incident at Santa Cruz, Sydney: Australian Section of the International Commission of Jurists, 1992

LDM Nelson "The Roles of Equity in the Delimitation of Maritime Boundaries" American Journal of International Law, Vol. 84, 1990, pp 837-858

Adam Schwarz A Nation in Waiting: Indonesia in the 1990s, Sydney: Allen & Unwin, 1994

David Scott Ten Days in East Timor and the Case for Talks, Melbourne: East Timor Talks Campaign, 1994

Sasha Stepan Credibility Gap: Australia and the Timor Gap Treaty, Canberra: Australian Council for Overseas Aid, 1990

Keith Suter "International Law and East Timor" Dyason House Papers (Melbourne) Vol. 5, No 2, December 1978

Kirsty Sword and Pat Walsh (Editors) "Opening Up": Travellers' Impressions of East Timor 1989-1991, Melbourne: Australia-East Timor Association, 1991

John Taylor Indonesia's Forgotten War: The Hidden History of East Timor, London: Zed, 1991

Michele Turner Telling: East Timor Personal Testimonies 1942-1992, Sydney: New South Wales University Press, 1994

United Nations Decolonization: The Task Ahead, New York: UN Department of Public Information, 1991

Ernest Willheim "Australia-Indonesia Seabed Boundary Negotiations" Maritime Studies, (Canberra), March 1987, pp 5-14

NOTES

1 Gareth Evans "Australia-Indonesia Ties: Timor Gap Zone of Co-operation", The Monthly Record (Canberra), February 1991, p 45.

2 Quoted in: Australian Council for Overseas Aid East Timor: Towards a Just Peace in the 1990s, Canberra, 1990, p 1.

3 "Pope, Ending Indonesia Visit, Issues Careful Plea on Rights", The New York Times, October 14 1989, p 2.

4 Adam Schwarz A Nation in Waiting: Indonesia in the 1990s, Sydney: Allen & Unwin, 1994, p 223.

5 Cameron Stewart "Breach in the Gap", The Australian, February 11 1995, p 26.

6 "Timor Sea Shapes Up as Major Oil Basin", International Business Asia (Sydney), March 17 1995, p 9.

7 Brian Toohey "Our Each-Way Bet on East Timor", Financial Review, February 9 1995, p 15.

8 "Indonesia's Policy on East Timor", The Australian, February 4 1995, p 24.